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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC., *et al.*,
Petitioners,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

At issue is the correctness of the District of Columbia Court of Appeals' construction of provisions of a workers compensation statute enacted by the District of Columbia Council for application only in the District of Columbia. The construction differs from this Court's construction of similar provisions of a federal statute that was the District of Columbia workers compensation act until the Council replaced it. This Court's decision was handed down four years after the Council acted and two years after its new local D.C. law took effect. That the case is within the Court's jurisdictional statute at all is dubious; it concerns solely the meaning of a District of Columbia law enacted by the District of Columbia Council. The judgment below is in any event the paradigm of a non-

final judgment outside this Court's jurisdiction; the several cases covered by the petition all go back to the District's superior court for trial. At the very most the only question for this Court is whether the court of appeals was egregiously wrong in its construction of the local statutory provisions, and that is plainly not a cert-worthy question.

The liability of contractors to employees of subcontractors has been a persistent issue in workers compensation law. The question is whether and, if so, under what circumstances a contractor is relieved of tort liability to an injured employee of one of the contractor's subcontractors. In *Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. 925 (1984), this Court attacked the question as it is posed by sections 4 and 5 of the Longshore and Harbor Workers' Compensation Act, the federal statute that governs workers compensation for shore-based maritime workers and, until 1982, was the District of Columbia's workers compensation statute. 44 Stat. (part 2) 1424 (1927), as amended, 33 U.S.C. §§ 901 *et seq.*; made applicable to the District by 45 Stat. 600 (1928), D.C. Code former § 36-501.[1] The Court, dividing 6-3, resolved what it described as "an ambiguity in the wording of these sections," 467 U.S. at 932, with a ruling that a contractor generally was protected from tort liability in a suit by an employee of a subcontractor.

The Court acknowledged that there was disagreement in the lower federal courts and the state courts at both steps of the analysis that led it to this ruling. 467 U.S. at 933, 936-37. The majority of the Court claimed faithfulness "to the plain language of the statute," *id.* at 938, for the second step of its analysis, but the dissent said that the majority had "simply fixed upon what it believes to be good policy and then patched together a rationale

[1] The statute was called the Longshoremen's and Harbor Workers' Compensation Act until amendments in 1984 (p. 4, *infra*) changed its name. 98 Stat. 1654.

as best it could," *id.* at 942, had reached its conclusion "by means of a rather clumsy sleight of hand," *id.* at 943, and had adopted a reading of the statute that was "internally inconsistent," *id.* at 945. The proper resolution of the ambiguity, in short, was one as to which reasonable people could differ.

Several years before this Court's *WMATA* decision, the District of Columbia Court of Appeals, interpreting the same statute, had reached a contrary result, the result advocated by the *WMATA* dissenters. *DiNicola* v. *George Hyman Constr. Co.*, 407 A.2d 670 (D.C. 1979). It held that a contractor was freed of tort liability to the employees of one of its subcontractors only if it stepped into a gap left by the subcontractor's failure to secure workers compensation coverage. That interpretation of sections 4 and 5 accorded, as the court noted, 407 A.2d at 674, with the interpretation placed on those sections and corresponding sections of similar workers compensation statutes by other courts. In particular, it accorded with an earlier decision of the District Court for the District of Columbia when it was the District's trial court of general jurisdiction. *Thomas* v. *George Hyman Constr. Co.*, 173 F. Supp. 381 (D.D.C. 1959).

A few months later, with *DiNicola* fresh on the books, the District of Columbia Council repealed the statute making the Longshore Act applicable to the District and enacted the District of Columbia Workers' Compensation Act of 1979 (actually enacted in 1980). D.C. Code §§ 36-301 *et seq.* The new statute was generally in the pattern of the Longshore Act, though not identical to it (*see* p. 13, *infra*). Its sections 4 and 5 do not differ significantly from those of the federal statute. (The relevant sections of the two statutes can be compared at Pet. App. 74a-75a.) The effectiveness of the local statute was delayed by a lawsuit challenging the Council's power to enact it. After the authority of the Council was sustained, *District of Columbia* v. *Greater Washington Cent. Labor*

Council, 442 A.2d 110 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983), the statute became effective in 1982, applicable to injuries suffered in the course of employment after its effective date.

This Court decided the *WMATA* case two years later. It concerned injuries that had occurred in the District before the new District statute became effective and therefore was governed by the Longshore Act and not the new District law. The *WMATA* interpretation of the Longshore Act, which did not purport to affect the new District law, was promptly overturned as it related to longshore and harbor workers. Congress at the time was considering comprehensive amendments to the Longshore Act. The conference committee wrote and Congress adopted amendments to sections 4 and 5 that overruled *WMATA* and made contractors generally liable to tort actions by employees of subcontractors. It made the amendments applicable to pending actions as well as future ones. Pub. L. 98-426, §§ 4, 28(a), 98 Stat. 1641, 1655 (Pet. App. 75a-76a). The conferees said that they believed that *WMATA* "does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983" and that therefore "[t]he case should not have any precedential effect." H.R. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984).

The cases that are the subject of the petition arose after the effective date of the new local statute and are therefore governed by it and not the Longshore Act. In two of them, the superior court granted a contractor's motion for summary judgment dismissing a tort complaint of a subcontractor's employee. (Pet. App. 18a-22a.) In the third the superior court denied such a motion. (*Id.* at 23a-31a.) The cases were consolidated on appeal. The court of appeals observed initially that the *WMATA* construction of the Longshore Act as that act had applied in the District was not an authoritative, binding construction of the new District of Columbia

compensation act. (Pet. App. 5a-6a.) It then proceeded to resolve the ambiguity in sections 4 and 5 of the new statute "[f]reed of the encumbrances flowing from contradictory judicial interpretations." (*Id.* at 6a.) It concluded that the better reading was that contractors are liable in tort to the employees of their subcontractors except when a subcontractor has defaulted on its workers compensation coverage obligation and the contractor has supplied the deficiency. (*Id.* at 6a-10a.)

The court concluded further that its reading was confirmed by application of the court's rule of construction that, "[w]hen a local provision is borrowed directly from a federal statute, the Council is presumed to have borrowed the judicial construction thereof as well." *Hughes* v. *District of Columbia Dep't of Employment Servs.*, 498 A.2d 567, 571 n.8 (D.C. 1985) (quoted at Pet. App. 11a). When the Council enacted its workers compensation statute, sections 4 and 5 of the Longshore Act, which the Council borrowed, had been construed by the court of appeals in *DiNicola*, by the district court in *Thomas*, and, in an even earlier case, by the District Court for the Eastern District of Virginia, *Liberty Mut. Ins. Co.* v. *Goode Constr. Co.*, 97 F. Supp. 316 (E.D. Va. 1951), to hold a contractor generally liable in tort to subcontractor employees. (Pet. App. 10a-14a.)

As for *WMATA*—apart from the disapproval of the result by Congress and the consequent denial to the decision of "any precedential effect"—the court noted that its rule of construction "applies only to such judicial constructions as have been placed on the 'borrowed' statute *prior* to its enactment by the jurisdiction adopting it." (*Id.* at 11a; emphasis in original.)[2] *WMATA* was a subsequent construction of the statute being borrowed that the Council could not possibly have taken into account when it was doing the borrowing. The court also relied

[2] That commonsense rule is also the rule of this Court. Stutsman County v. Wallace, 142 U.S. 293, 312 (1892).

on specific elements of the legislative history of the Council enactment and on the consistency of what it considered the proper reading of sections 4 and 5 with what it viewed as "the philosophy underlying workers' compensation schemes." (*Id.* at 15a.)

The court held that the subcontractor employees in the several cases before it could sue the contractors for tort damages. It reversed and affirmed the superior court rulings as appropriate and returned all the cases to the superior court for trial on the merits.

ARGUMENT

Seldom has so much been made of so little as in the petition in this case. Petitioners ask this Court to review a classically non-final judgment of a court, directed by Congress to be treated for this Court's jurisdictional purposes as the "highest court of a State," interpreting a statute enacted by its own legislature. The lack of finality means that this Court has no jurisdiction of the case. There are other jurisdictional obstacles. The District of Columbia Council's workers compensation act may not be a "statute of the United States" within this Court's jurisdictional statute, and there is certainly no other federal issue. And, if the Court did have jurisdiction, the only possible question for it would be whether the District of Columbia Court of Appeals was egregiously wrong in interpreting the Council's workers compensation statute as it did. That is neither a substantial question nor a question of any but local importance.

1. This Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. The District of Columbia Court of Appeals is the "highest court of a State" for purposes of this Court's jurisdiction. *Id.* The judgment or decree of the D.C. Court of Appeals in these cases amounts to the denial of

motions to dismiss complaints for legal insufficiency under local law. There has been no judgment or decree adjudicating anyone's liability to anyone else. The motions to dismiss having been denied, the cases in the ordinary course will proceed to jury trials of the defendant contractors' liability to the plaintiff workers. If that is not a non-final judgment, then nothing in this Court's jurisprudence is.

But, of course, it is a non-final judgment. In *Catlin* v. *United States*, 324 U.S. 229 (1945), the Court, applying what is now 28 U.S.C. § 1291 limiting appeals to the courts of appeals to final decisions of the district courts, said that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *id.* at 233, and that the "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable," *id.* at 236. The policy demanding finality under Section 1257 is stronger even than that underlying Section 1291, since it rests not just on avoiding piecemeal review but also on minimizing "federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). And so, in general, when the effect of the judgment of the highest court of a state is to send a case back for trial, this Court has no jurisdiction to review that judgment, however momentous the issue the state court has decided. *Flynt* v. *Ohio*, 451 U.S. 619 (1981) (per curiam).[3]

There are, to be sure, some state-court judgments that leave more to be done than their execution that are nevertheless treated as final under Section 1257. The cases were categorized in *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469 (1975). Petitioners seemingly would place their

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[3] *See also* Gillette Co. v. Miner, 459 U.S. 86 (1982) (per curiam); O'Dell v. Espinoza, 456 U.S. 430 (1982) (per curiam).

case in the fourth of the *Cox Broadcasting* categories (none of the other three is even colorably relevant): cases in which resolution of the federal issue in favor of the petitioner or appellant would end the controversy and "a refusal immediately to review the state-court decision might seriously erode federal policy." 420 U.S. at 483; *see id.* at 482-87. Petitioners cite *Goodyear Atomic Corp.* v. *Miller*, 108 S. Ct. 1704 (1988) (Pet. 1), where the Court placed in that category a decision of the Ohio Supreme Court that the Atomic Energy Act did not preempt the state's power to apply safety standards beyond those of federal law. The Court undertook immediate review, even though there would be further workers compensation proceedings, because "the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production." 108 S. Ct. at 1709. Petitioners' implied claim of equivalency of the Atomic Energy Act and the District of Columbia Workers' Compensation Act is breathtaking in its audacity—but wanting in good sense.

Petitioners cite two other cases for their assertion that the judgment below is final. They are equally far afield. Petitioners' reliance on one of them is a play on words. In *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the Court held that a public official could appeal at once to a court of appeals from a district-court judgment denying his claim of common-law qualified immunity from a suit seeking damages for violation of a constitutional right. The case stands in the line of *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982), holding that public officials, whose immunity ensures that they are not inhibited in the performance of their public duties, must be immune from suit as well as from liability to achieve that assurance. 472 U.S. at 525. The petitioner contractors claim to be "immune" from liability in tort to the employees of their subcontractors, but all they mean by that is that, if they were right on the law, they would ordinarily have a defense to a negligence action by such an employee.

Claimed "immunity" of that sort is quite a different immunity from that of public officials.

Petitioners' final citation, of *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963), is mystifying (except perhaps as another attempt to ride the word "immune"; the Court mentioned that the petitioner had claimed that it was "immune from suit" in the Texas court where it had been sued, 371 U.S. at 556). In that case, the Texas Supreme Court's reading of the national bank venue statute permitted trial of an action against national banks in a state court in one county instead of requiring trial in another county. If the Texas court's interpretation of the federal statute was incorrect and review was delayed until after the trial in the wrong court, there might have to be two trials. This Court therefore undertook to review immediately the Texas court's interpretation of the federal bank venue statute. 371 U.S. at 558. The case was later explained as one in which a state court had rejected "a party's federal-law claim that he [was] not subject to suit before a particular tribunal." *Mitchell* v. *Forsyth*, 472 U.S. at 525 n.8. Petitioners, by contrast, make a local-law claim they are not liable in any court to employees of their subcontractors. They make no independent federal-law claim at all, much less one that they are not "subject to suit before a particular tribunal."

If *Langdeau* were taken to mean that the threat of an unnecessary trial makes any judgment final, the result would be the very swallowing of the rule of finality by an exception that the Court cautioned against in *Flynt*. 451 U.S. at 622. But unless it means that, it has nothing to do with petitioners' case. There is nothing unusual about the trials they face. The hardship of a trial is certainly "one of the painful obligations of citizenship," *Parr* v. *United States*, 351 U.S. 513, 520 (1956), quoting *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940), but it "is one . . . Congress contemplated" in establishing

and maintaining the final judgment rule, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). In cases such as this one where remand for trial will not infringe any federal policy, the inconvenience and cost of requiring the petitioner "to hazard a trial," *Parr*, 351 U.S. at 519, has never been held sufficient to confer jurisdiction on this Court to review an otherwise non-final judgment.

2. Petitioners acknowledge a doubt whether their case would be covered by Section 1257 even if the judgment were final. In *Key* v. *Doyle*, 434 U.S. 59 (1977), the Court held that a provision of the District of Columbia Code enacted by Congress was not a "statute of the United States" within the meaning of old Section 1257(1). Thus, a case in which the D.C. Court of Appeals had sustained a constitutional challenge to a provision of the D.C. Code was not within the Court's jurisdiction on appeal. As dissenting Justices pointed out, the Court's ruling made it uncertain whether a D.C. Code provision could be a statute of the United States whose interpretation by the D.C. Court of Appeals would be within the Court's certiorari jurisdiction under old Section 1257(3), now Section 1257(a). 434 U.S. at 74 n.6.

The uncertainty is the greater in this case because this case involves solely the interpretation of provisions of the D.C. Code enacted by the D.C. Council—not by Congress. There is no issue of constitutional law or of national statutory law. The Council acts by delegation from Congress, true enough. But that fact does not answer the question whether petitioners, who assert merely that the local District of Columbia court misinterpreted a statute enacted by the local District of Columbia Council, have specially set up or are claiming "any title, right, privilege or immunity . . . under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. § 1257(3), now § 1257(a).

3. Petitioners try to make the most of their impossible predicament by urging the uncertainty of the Court's

statutory jurisdiction as a reason for granting the writ. (Pet. 14-19.) The Court may find it appropriate some day to resolve the uncertainty left by *Key* v. *Doyle* (an uncertainty that becomes dubiety when the D.C. Council is the lawmaker) if it is confronted with a case that both satisfies the criteria of Rule 17 and involves the interpretation by the D.C. Court of Appeals of a D.C. Council statute. That will happen rarely. It has not happened here.

The decision below affects contractors and subcontractors and their employees in the District of Columbia only. It has no national implications. If it is reviewable at all, it is reviewable—at most—according to the highly deferential standard that the Court has always applied when reviewing the District of Columbia courts' rulings on issues of local law. By that standard, the case is as easy in its disposition as it is unimportant.

The court of appeals' interpretation of sections 4 and 5 of the new D.C. workers compensation law is reasonable on its face. It accords with the interpretation of those sections by a number of the courts that have considered the issue. It accords with the view of the very similar sections 4 and 5 of the Longshore Act taken by three Justices of this Court. It accords with the view of Congress as to what those sections of the Longshore Act meant from 1927 until 1983 and with what they continue now to mean after Congress amended them to make its intent clear. The court of appeals' interpretation does not present one of those "exceptional situations where egregious error has been committed" that might justify this Court in "overruling the courts of the District" on a local law matter. *Pernell* v. *Southall Realty*, 416 U.S. 363, 369 (1974), quoting *Fisher* v. *United States*, 328 U.S. 463, 476 (1946).

Add to the reasonableness on its face of the court's interpretation of the D.C. Code provisions the fact that, at the time the D.C. Council enacted its new workers

compensation statute and borrowed sections 4 and 5 of the Longshore Act, the most pertinent interpretations of those sections limited contractors' freedom from tort suits in the same way the court's interpretation of the new local sections 4 and 5 does. Under the court of appeals' rule of construction, the Council was presumed to have adopted those interpretations of the statute it was borrowing. Petitioners rail against this rule of construction in its application here (Pet. 24 n.16), invoking this Court's authority for the indubitable proposition that sometimes the presumption has little relationship to reality. But this Court has been known to indulge in the presumption itself,[4] and it surely is not an "egregious error" for another court to do so.

What the bluster in this part of the petition (Pet. 19-29) comes down to is that the court of appeals' interpretation of the Council's enactment differs from this Court's interpretation of the Longshore Act in *WMATA*. That, however, should be the beginning of analysis, not the end. The question that has to be asked after the difference in interpretation is acknowledged is whether the court of appeals was bound by this Court's decision. There is no reason in logic, constitutional imperative, statute or precedent for an affirmative answer to the question.

Petitioners manage to suggest that there might be a reason only by blurring the critical fact that there are two separate statutes, one enacted by Congress and construed in *WMATA* and the other enacted by the Council (before *WMATA* was decided) and construed by the court of appeals here. (*See especially* Pet. 19-20.) It is true that the latter statute, in sections 4 and 5, is mod-

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[4] Joines v. Patterson, 274 U.S. 544, 549 (1927); Sexton v. Dreyfus, 219 U.S. 339, 344 (1911); James v. Appel, 192 U.S. 129, 135 (1904). *See also* Lorillard, Inc. v. Pons, 434 U.S. 575, 580-81 (1978).

eled on the former. (But it is not true that the statutes are identical. The Longshore Act does not contain the reciprocal definitions of "employee" and "employer" found in D.C. Code §§ 36-301(9) and (10) and emphasized by the court of appeals (Pet. App. 7a-8a) as inconsistent with an employer-employee relationship between a contractor and the employees of its subcontractors.) It is also true, as petitioners tell us at numbing length (Pet. 21 & n.13), that state courts often find federal court interpretations of statutes their legislatures have borrowed persuasive. But they are not bound by those interpretations, even when they have emanated from this Court. *Cf. Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942); *Miller's Executors* v. *Swann*, 150 U.S. 132, 136-37 (1893). The six Justices of the majority in *WMATA* may wish their opinion had been found more persuasive by the court of appeals. That is not the issue. The issue, if there is any issue at all, is whether the court of appeals was egregiously wrong. That is not a debatable issue.

4. For want of any intrinsic merit to the questions advanced, the petition becomes an indictment of the court of appeals, and particularly Judge Mack, for *lèse majesté*. Since *lèse majesté* is not a crime in the United States, even within judicial hierarchies, this Court need not decide whether it, as the target of the alleged indignities, is the proper body to sit in judgment on the indictment. In any event, the indictment is overdrawn. After all, in no other jurisdiction than the District of Columbia does this Court's *WMATA* interpretation of sections 4 and 5 of the Longshore Act have any vitality. Congress wiped it off the books as soon as it could, for both future and pending cases. However, by the decision of the court below in *Estep* v. *Construction General, Inc.*, 546 A.2d 376 (D.C. 1988) (Pet. App. 42a-70a), the *WMATA* interpretation governs cases that arose in the District before the new local workers compensation act became effective

in 1982 and the statute making the Longshore Act applicable in the District was repealed. The court held that the general federal savings statute, 1 U.S.C. § 109, preserved this Court's post-repeal interpretation of the saved statute in *WMATA* in 1984, although it excluded the congressional amendment of the statute to overrule *WMATA* in the same year. As Judge Mack pointed out in her dissent, "[t]here is a certain incongruity in the majority's reasoning that the Congress cannot amend a statute no longer in existence but that the Supreme Court can interpret it." (Pet. App. 69a.) The incongruity is understandable in jurisprudential theory, but the court that is responsible for the incongruity can certainly not be said to be disrespectful of this Court's authority.

And what of Judge Mack? In her opinion for the court in the cases that are the subject of the petition, she said little more than what is obvious: that in *WMATA* "the Supreme Court *did not* interpret the District of Columbia Workers' Compensation Act of 1979" and that her court in those cases *was* interpreting the local 1979 statute. (Pet. App. 5a-6a; emphasis in original.) When discussing the court of appeals' rule of construction of borrowed statutes, she also said, by way of emphasizing that it is only prior judicial interpretations of the borrowed statute that qualify for the presumption that they were adopted by the Council, that "[a]ny subsequent interpretations by this court will be binding on us; any subsequent interpretations by another court carry no precedential value." (Pet. 11a.) The petition truncates this comment and flaunts the truncated version as proof of Judge Mack's lack of respect for the authority of this Court. (Pet. 12, 14.) In truth, however, she was making a point as obvious as the one she made at the outset of her opinion: an interpretation by this Court of the Longshore Act after it was borrowed does not help determine what the Council meant in borrowing it; nor is it an authoritative interpretation of the Council's statute itself.

In her dissent in the *Estep* case, Judge Mack said some things that may be more debatable. But—to take what may be the most debatable example—her suggestion, offered "delicately" and rejected by her colleagues of the majority, that "it is not at all clear that acts of Congress affecting only the District are 'laws of the United States' within the meaning of Article III" (Pet. App. 59a) played no part in the court's decision in this case. The indictment of Judge Mack is a red herring.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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